

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

OGLALA SIOUX TRIBE,

Petitioner,

V.

**UNITED STATES NUCLEAR
REGULATORY COMMISSION and the
UNITED STATES OF AMERICA,**

Respondents.

No. 17-1059

**FEDERAL RESPONDENTS' REPLY TO PETITIONER'S RESPONSE TO
FEDERAL RESPONDENTS' MOTION TO DISMISS**

In our motion to dismiss, we explained that the contested adjudication regarding the license issued to Powertech (USA), Inc., is still ongoing, and that the Commission’s most recent decision (CLI-16-20)¹ resolved only some, not all, of the Tribe’s pending adjudicatory claims. The Tribe’s response to our motion acknowledges this, recognizing that CLI-16-20 “marks the end of the administrative process *for a number of issues*” but that “some limited NRC staff work remains.” Response at 12 (emphasis added). This admission dooms the Tribe’s arguments.

¹ Exh. A to Motion to Dismiss.

The Tribe nonetheless attempts to justify the facial prematurity of its petition for review. Its various arguments, which fail to demonstrate the required “finality” and show no harm to the Tribe if its current petition for review is held to be premature, are unavailing.

1. Most of the Tribe’s arguments in its response rely in some manner on Powertech already having an effective (albeit provisional) NRC license. This fact, however, has been true since 2014. It did not result from the NRC’s CLI-16-20 order, issued in December 2016, that the Tribe claims opened the 60-day Hobbs Act jurisdictional window. *See* Response at 5.

The Tribe attempts to evade this inconvenient fact by repeatedly describing CLI-16-20 as performing an “affirming” function with respect to Powertech’s license. *See* Response at 8, 11-14. Yet Powertech’s license was just as “effective” before CLI-16-20 as it was after CLI-16-20. All that CLI-16-20 did was to hold that some of the Tribe’s adjudicatory contentions challenging the NRC staff’s review of the Powertech license application had merit, and required further NRC action, while some others did not. *See generally* Exh. A to Motion to Dismiss; *see also* Response at 9-10 (describing CLI-16-20 in essentially the same way). Nothing in CLI-16-20 modifies or enhances the effectiveness of the Powertech license.

While the Tribe's theory relies, at bottom, on this Court's ruling in *Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991), *see* Response at 8-9, that case serves only to expose the flaws in the Tribe's argument. In *Massachusetts*, this Court found jurisdiction to review an NRC "immediate effectiveness" decision, which authorized immediate use of a license even though a contested adjudication remained pending. However, this Court explained that the "immediate effectiveness" decision was the *sole* NRC decision over which the Court had jurisdiction at the time, given that the overall NRC adjudication was not yet complete. *Id.* (discussing the "exceedingly limited" scope of this Court's review in that case, which was "akin to the review of a district court's grant of a preliminary injunction"). In so holding, this Court expressly *rejected* the argument, akin to what the Tribe suggests here, that the Court could *also* exercise jurisdiction over the various other questions at issue in that still-incomplete licensing proceeding. *Id.* ("We reject petitioners' argument that immediate effectiveness renders the [Atomic Safety and] Licensing Board's decisions and all related 'intermediate, procedural or preliminary non-final actions or rulings' of the NRC reviewable by this court.").

In contrast to the scenario in *Massachusetts*, the Tribe is not raising a narrow "effectiveness" challenge within 60 days of an NRC order rendering Powertech's license effective. Indeed, the NRC issued the Powertech license in 2014, and it has

been effective ever since. *See* Motion to Dismiss at 4; *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 2015 WL 7444635, 81 NRC 618, 632 (2015); Exh. A to Motion to Dismiss at 33; Attach. 2 to Response at 15 (Powertech's license, showing issuance date of April 8, 2014). The Tribe does not claim otherwise. And as discussed above, CLI-16-20's issuance had no effect on the legal status of the Powertech license. Whatever may be holding up the Powertech project at the present time, *see* Response at 13 n.4; *see also* Powertech (USA), Inc.'s Response in Support of Federal Respondent's Motion to Dismiss at 3-4, it has not been any lack of legal effectiveness of Powertech's NRC license.²

Instead of raising a narrow, timely "effectiveness" challenge, the Tribe is asking this Court to exercise jurisdiction over the overall NRC licensing decision for Powertech. This is clear from the Tribe's Statement of Issues to be Raised, as well as its response to our motion to dismiss, which both indicate an intent to litigate the NRC's resolution of a range of contentions raised by the Tribe in the

² To the extent that uncertainty regarding the NRC contested adjudication's outcome may be deterring the project from moving forward, that uncertainty existed prior to CLI-16-20 and remains after CLI-16-20. CLI-16-20 upheld the Board's finding of NEPA and NHPA compliance deficiencies, and the process of attempting to remedy those deficiencies to the satisfaction of the NRC's adjudicatory decisionmakers remains unfinished, with its outcome still uncertain. *See* Motion to Dismiss at 10-11.

NRC contested adjudication. *See* Petitioner’s Statement of Issues to be Raised; Response at 9-10.

Moreover, the Tribe’s challenge to the one NRC determination in this case that bears at least some arguable similarity to the “immediate effectiveness” order at issue in *Massachusetts* may be overcome by events before this Court has an opportunity to address it, even if this Court allows proceedings on the instant petition to review to move forward. In CLI-16-20, the Commission affirmed the Board’s decision not to vacate the license upon finding merit in the Tribe’s Contentions 1A and 1B. This gives rise to what the Tribe states is “a fundamental legal contention by the Tribe—that the agency cannot issue a license when it admits that the Final EIS issued as support for the license decision violates NEPA and the NHPA.” Response at 13; *see also* Petitioner’s Statement of Issues to be Raised ¶ 1.

Yet the NRC is plainly engaged right now in an effort to *cure* the identified statutory deficiencies. *See* Motion to Dismiss at 5-7, 10-12.³ If this curative effort is completed to the satisfaction of the NRC’s adjudicatory decisionmakers while the instant petition for review is still pending in this Court, there will no longer be an agency-identified statutory deficiency by the time the Court has a chance to

³ Moreover, neither the Board’s 2015 decision (LBP-15-16) nor the Commission’s 2016 decision on appeal (CLI-16-20) “issued” the license, which had already been issued by the NRC staff in 2014.

decide the case. In addition, because the contested adjudication could potentially result in modifying or revoking Powertech's license, *see* LBP-15-16, 81 N.R.C. at 638 n.104; Motion to Dismiss at 14-15, Powertech's license may be different, or even nonexistent, by the time this Court would rule on the case's merits. Further, much of the record of the NRC's actions to cure the deficiency would be developed *after* the date of the Tribe's petition for review in this Court, and thus would necessarily fall outside of the record for which review has been sought.

In any event, the Tribe does not explain why the Court must conduct its review *now* in order to remedy this allegedly improper failure by the NRC to vacate the license pending the outcome of the remaining NRC proceedings. Although claiming vaguely in its response "that the Tribe 'will irreparably lose important rights,'" the Tribe does not support this claim with specifics. *See* Response at 14-15.⁴ In truth, if the Court, once the NRC proceedings are complete and a timely petition for review is filed, holds that the NRC failed to comply with NEPA or the NHPA in some respect, the Court can order appropriate and effective relief at that time, including vacating the Powertech license. The Tribe has not

⁴ As discussed below, the Tribe has similarly not attempted to demonstrate *to the NRC* that the license remaining effective while Contentions 1A and 1B are being addressed will irreparably harm the Tribe.

explained why this review must take place while the NRC proceeding is still ongoing.

2. The Tribe argues that our position “would effectively preclude Hobbs Act review of an effective license indefinitely, even where NRC adjudications twice confirmed the License was granted without compliance with applicable laws.” Response at 6. Yet this argument ignores the NRC’s process for obtaining a stay of a license’s effectiveness, as well as the opportunity—consistent with this Court’s decision in *Massachusetts*—to obtain Hobbs Act judicial review directly from an NRC denial of a stay request.

As noted in our motion to dismiss, intervenors in NRC licensing proceedings may request a stay of an already-issued license pending the outcome of contested adjudicatory proceedings. Motion to Dismiss at 4-5 (citing 10 C.F.R. § 2.1213). In fact, the Tribe asked the Board for this very relief after the NRC staff issued the Powertech license in 2014. *Id.* Yet, when the Board denied that request based on its finding that the Tribe had not demonstrated it would suffer irreparable harm from Powertech’s license remaining effective, the Tribe did not petition for even *the Commission’s* review of that stay-denial decision, let alone seek judicial review.

In addition, when the Board later found merit in the Tribe’s Contentions 1A and 1B—i.e., the “compliance with applicable laws” issue to which the Tribe refers

in its Response—the Board specifically instructed the Tribe that it could file a *new* request to stay the effectiveness of the Powertech license if it could show irreparable harm. LBP-15-16, 81 NRC at 658 (“In the interim, if the Oglala Sioux Tribe can identify specific cultural, historic, or religious sites that are subject to immediate and irreparable harm by the Powertech project, they may, within 10 days of this Order, petition this Board for a stay of the license’s effectiveness, as may be necessary to halt ground disturbing activities.”). But the Tribe opted not to request a stay. Exh. A to Motion to Dismiss at 33.

Although the Tribe, when appealing the Board’s merits decision to the Commission, argued that the Board should have simply vacated the Powertech license on its own pending final resolution of the Tribe’s Contentions 1A and 1B, the Tribe again made no effort in that appeal to show that the effectiveness of Powertech’s license was causing it irreparable harm. *Id.* Thus, the Commission, in CLI-16-20, saw no basis to disturb the continuing effectiveness of Powertech’s license. *Id.*

Having made only a limited attempt in 2014 to seek a stay of the license’s effectiveness at the NRC, and having made no such attempt after the Board found merit in the Tribe’s Contentions 1A and 1B, the Tribe now portrays the license’s effectiveness, and the undefined harms that flow from it, as sufficient to warrant expanding the meaning of “finality” under the Hobbs Act. This expansion request

comes in spite of this Court’s recognition that Hobbs Act finality must be “narrowly construed.” *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 28 (D.C. Cir. 2014).

Ultimately, the Tribe is proposing a judge-made solution (in the form of an expansion of the Court’s finality jurisprudence) in the absence of a problem. Consistent with this Court’s holding in *Massachusetts*, if the Tribe had asked the Commission to stay the Powertech license based on a claim of irreparable harm, but were unsuccessful, the Tribe could have immediately petitioned for review to this Court on the narrow question of whether the NRC abused its discretion in denying the stay request. *See Massachusetts*, 924 F.2d at 922. But if the Tribe is unable (or opts not) to demonstrate to the Commission irreparable harm to support a stay, then it is unclear what interest its requested expansion of Hobbs Act “finality” would be safeguarding. In such a circumstance, the Tribe should simply be able to await the NRC proceeding’s completion before petitioning for judicial review, and any issues regarding whether the NRC’s NEPA or NHPA compliance efforts—including the NRC’s approach to addressing Contentions 1A and 1B—violated the statutes can be litigated then, as is typical in Hobbs Act cases.

3. In trying to demonstrate finality, the Tribe also mischaracterizes the state of the NRC’s NEPA-compliance activities. The Tribe’s response argues that “the NRC has finalized its environmental impact statement [EIS] in this case and ‘since

the final EIS already has been published, [judicial] review will not disrupt the process of adjudication.” Response at 10 (quoting *Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676, 681 (7th Cir. 2006)). Yet this assertion ignores the text of the Board’s LBP-15-16 order, which expressly contemplated that the NRC staff’s additional work to address the Tribe’s Contentions 1A and 1B may require the NRC “to supplement the [Final Supplemental Environmental Impact Statement].” LBP-15-16, 81 NRC at 657. This work remains ongoing, as discussed in the motion to dismiss.

With EIS supplementation a distinct possibility, the Tribe’s description of the EIS as “finalized” is inapposite. Indeed, given the centrality of an EIS to the NEPA-compliance process, *see* 42 U.S.C. § 4332, it would be nonsensical for the NRC to consider the EIS “finalized” while simultaneously requiring its staff to conduct further environmental impact assessment to comply with NEPA. *See* Motion to Dismiss at 10-12.

Thus, the Tribe here is not asking this Court to review a complete, stand-alone final agency action like the Army Corps of Engineers’ “approved jurisdictional determination” at issue in *Army Corps of Engineers v. Hawkes*, 136 S.Ct. 1807 (2016). *See* Response at 11 (discussing *Hawkes*). That agency action was one that the agency itself described in regulations and guidance as a “final agency action” that would “remain valid for a period of five years,” and it was an

action that defined a property owner's exposure to potential legal liability in specific ways, with no further proceedings expressly contemplated. *See* 136 S. Ct. at 1814.

Here, by contrast, the Tribe is asking this Court to review various aspects of the NRC's Powertech EIS at the same time that the NRC is itself trying to resolve a challenge brought by the Tribe against the very same EIS, with supplementation of the EIS a distinctly possible outcome of the ongoing adjudicatory process. Further, as previously noted, these ongoing efforts at the NRC could potentially prompt modification or revocation of the license. Given that the NRC has *already found* noncompliance with NEPA and has yet to fix the noncompliance, this possibility of an effect on the license is not akin to the mere speculative possibility that an agency, having already acted, could later change its mind if new information arises. *See id.* Instead, what is before the Court now is simply a premature petition for review that aims to challenge the results of an agency proceeding that is still underway. Accordingly, dismissing the Tribe's petition for review would not conflict with the Supreme Court's decision in *Hawkes*.

In sum, the NRC proceeding remains ongoing, and the Tribe neither disputes this fundamental point nor demonstrates why its petition for review merits an expansion of finality doctrine under the Hobbs Act.

CONCLUSION

For the reasons stated above and in our motion to dismiss, the Court should dismiss the petition for review for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Federal Respondents' Reply to Petitioner's Response to Federal Respondents' Motion to Dismiss complies with the formatting and type-volume restrictions of the rules of the U.S. Court of Appeals for the District of Columbia Circuit. The reply was prepared in 14-point, double spaced, Times New Roman font, using Microsoft Word 2013, in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The reply contains 2,541 words and therefore complies with Fed. R. App. P. 27(d)(2)(C).

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2017, the Federal Respondents' Reply to Petitioner's Response to Federal Respondents' Motion to Dismiss was served on all counsel of record in case number 17-1059 through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

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